must be left to the subjective satisfaction of the Cabinet and the Minister if there is, as I find in this case, credible evidence or material similar in nature to those accepted by Lord Atkin in *Greene's* case,[14] the House of Lords in the *GCHQ* case[12] and Taylor J in *Ruddock's* case.[13]

Finally, I turn to the submission that if the detention of the applicant was lawful it had become unlawful as the nature and conditions of imprisonment had fallen below minimum standards of treatment and I was referred to *Middleweek* v *Chief Constable of Merseyside*,[19] per Ackner LJ (as he then was) and *R* v *Secretary of State for the Home Department, ex p Herbage (No 2)*.[20]

The conditions of imprisonment were described by Lim Chin Ow, the officer-in-charge of the detention centre. He affirmed that the cell measures 6.64 sq metres, 20% larger than the basic requirement listed by the American Correctional Association. I was told that the room is spartan but clean and that the applicant was issued with mattress, bedsheet, 'Dunlopillo' (foam) pillow, pillow case, blanket, tooth brush, toothpaste and other necessities. The applicant, like the other detainees, is allowed twenty minutes exercise once in the morning and once in the afternoon daily. In addition, she has been taken out of her room three to six times a week for periods ranging from 50 minutes to 2½ hours on each occasion to an air-conditioned room where she could read and she was provided with light refreshment. She has been given food in accordance with the prescribed diet scales, medical treatment, correspondence and visits under the Internal Security (Detained Persons) Rules 1960. Moreover, the Board of Inspection comprising Justices of the Peace has inspected the detention centre once a month. The applicant had requested that the flourescent light in the room be switched off after midnight but the prison authorities said that the room had to be kept lit so that the guard could monitor the detainee's well-being. It was suggested that she could use an eyeshade.

I find that the conditions of imprisonment have complied with the detention rules and there is no question that the nature and conditions of imprisonment had fallen below minimum standards.

The application is accordingly dismissed with costs.

Order accordingly.

Solicitors: *Teo Lai & Lee.*

Reported by *Wong Kim Fatt*

Arab Bank Ltd v Ng Soo Jin & Ors (Bank of Montreal, Third Party)

HIGH COURT (SINGAPORE) – SUIT NO 1134/85
CHAO HICK TIN JC
27 JULY 1988

Civil Procedure – Charging order against second defendant's property after judgment – Property mortgaged to appellant – Service of bankruptcy notice on second defendant after order nisi – Second defendant committed act of bankruptcy one day after order absolute – Affidavit stating second defendant 'probably insolvent' – Whether assistant registrar should have made the order absolute – Appeal to set aside charging order – Whether full and frank disclosure by plaintiffs – Rules of the Supreme Court 1970, O 49, O 50 r 1(4), (6)

Bankruptcy – Second defendant as purchaser of property served with bankruptcy notice – Act of bankruptcy committed one day after charging order made absolute – Priority – Whether inequitable to make order absolute – Bankruptcy Act (Cap 20, 1985 Ed), s 49

On 29 April 1985, the plaintiffs obtained a judgment against the second defendant for $3,184,070.81 with interest. They then applied for a charging order in respect of the property known as Blk 119, Sunset Way, 06-01, Singapore ('the property'), of which the second defendant (Goh Yoke Hian) was the purchaser. The property was mortgaged to Singapore Finance Ltd ('the appellant'), but it was erroneously stated in the affidavit of one Lai Mun Kwan in support of the application that it was mortgaged to the Development Bank of Singapore and DBS Finance Ltd.

After the making of the order nisi on 25 July 1985, but before it was made absolute, the third party (Bank of Montreal, a creditor of the second defendant) intervened. In an affidavit filed on behalf of the third party, the court was informed that the third party had obtained a judgment against the second defendant on 5 August 1985 in Suit No 2089/1985 for $2 million, plus interest and costs. The third party believed that the second defendant was 'probably insolvent'. An order absolute was made on 30 August 1985 in favour of both the plaintiffs and the third party. On 23 August 1985, the plaintiffs served a bankruptcy notice on the second defendant. As no payment was made pursuant to the notice, the second defendant committed an act of bankruptcy on 31 August 1985, a day after the making of the order absolute. The second defendant was made a bankrupt on 17 October 1986.

At the time of the making of the order absolute, a caveat had already been lodged at the Land Titles Registry by the appellant on 3 April 1981. On 10 October and 20 November 1985, the plaintiffs and the third party respectively lodged their caveats pursuant to the charging order. Owing to an oversight, the appellant allowed its caveat to lapse. However, it filed a fresh caveat on 3 September 1986. On 29 December 1986, the appellant applied by summons-in-chambers to be added as a party and to set aside or vary the charging order obtained by the plaintiffs and the third party. The application to set aside or vary the charging order was refused by the assistant registrar. The appellant appeals against the refusal of the assistant registrar to set aside or vary the charging order on six main grounds.

Held, dismissing the appeal: (1) Nothing in O 50 r 1 of the Rules of the Supreme Court 1970 requires that the particulars

of any other party who may have an interest in the property be disclosed. In any event, the present case was not a case of non-disclosure. The intention to disclose was clearly there when the plaintiffs exhibited the subsidiary strata certificate of title.

(2) The subsidiary strata certificate of title was exhibited and there was no lack of full and frank disclosure. The errors do not amount to an important misstatement. There was no allegation that at the time when the order nisi was made on 25 July 1985 there was any non-disclosure as the bankruptcy notice had not yet been served. The second defendant's absence in the inter partes hearing should not be held against the plaintiffs.

(3) There is nothing in O 50 r 1 which requires that the order nisi should be served on any other party who may have an interest in the same property. The court obviously did not think it necessary to hear the appellant as mortgagee. The wrong name given in respect of the mortgagee could not affect the decision of the court in making the charging order absolute.

(4) On the date the charging order was made absolute on 30 August 1985, no act of bankruptcy had yet been committed by the second defendant and no bankruptcy petition had been filed against him. An act of bankruptcy must have been committed before the court should refuse to make any order absolute. The mere issue and service of a bankruptcy notice does not bring into operation the statutory scheme contained in the Bankruptcy Act.

(5) This is not the proper forum to deal with the question of priority. The charge was not created by the second defendant but by the process of law at the initiative of a judgment creditor.

(6) The application of the plaintiffs did identify the immovable property on which it was sought to impose a charge. Order 50 r 1(4) was therefore satisfied.

(7) The appellant had failed to show that there had been any serious irregularity in the plaintiffs' application to obtain the charging order. That should suffice to dismiss this appeal. Further the appellant had not shown that the plaintiffs and the third party had acted with undue haste or had taken any unfair advantage. The appellant had failed to show that it was inequitable to make the order absolute.

Cases referred to

1 *Republic of Peru* v *Dreyfus Brothers* (1886) 55 LT 802 (not folld)
2 *R* v *Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac* [1917] 1 KB 486 (refd)
3 *Maclaren* v *Stainton* 51 ER 786 (refd)
4 *The Committee of Receivers of Abdul Walab Galadari* v *Zealcastle Ltd* (unreported) (not folld)
5 *George Lee & Sons* v *Olink* [1972] 1 All ER 359 (distd)
6 *Burston Finance* v *Godfrey* [1976] 2 All ER 976 (refd)
7 *Roberts Petroleum* v *Bernard Kenny* [1983] 1 All ER 564 (refd)
8 *Wilson* v *Metropolitan Property* [1975] 2 All ER 814 (refd)
9 *Hudson's Concrete Products Ltd* v *DB Evans (Bilston) Ltd* (1961) 105 SJ 281 (refd)
10 *Rainbow* v *Moorgate Properties Ltd* [1975] 2 All ER 821 (refd)
11 *Weldtite Engineering Ltd* v *Beverly Engineering Ltd* (1986) (unreported) (distd)
12 *Re A Debtor* [1977] 3 All ER 489 (refd)
13 *Hawks* v *McArthur Dalston Development Pty Ltd* v *Dean* [1967] WAR 176 (refd)
14 *Holt* v *Heatherfield Trust Ltd* [1942] 1 All ER 404 (refd)
15 *Whitworth* v *Gaugain* 67 ER 444 (refd)
16 *Chung Khiaw Bank Ltd* v *United Overseas Bank Ltd* [1970] 1 MLJ 185 (distd)
17 *Re Overseas Aviation Engineering (GB) Ltd* [1962] 3 All ER 12 (distd)
18 *O'Brien* v *Killeen* [1914] 2 IR 63 (refd)
19 *Marshall* v *James* [1905] 1 Ch 432 (refd)
20 *Moore* v *Peachey* (1892) 8 TLR 406 (refd)

Legislation referred to

Bankruptcy Act (Cap 20, 1985 Ed) s 49
Rules of the Supreme Court 1970 O 49, O 50 rr 1, 1(4), 1(6), 7
Charging Orders Act 1979 [UK] s 3(5)
Rules of the Supreme Court [UK] O 50 r 7

G Pereira for the applicant/appellant.
Chan Kok Chye for the plaintiffs.
Koh Kok Wah for the third party.

Cur Adv Vult

Chao Hick Tin JC: On 29 April 1985, the plaintiffs obtained a judgment in these proceedings against the second defendant for $3,184,070.81 with interest. They then applied for a charging order in respect of the property known as Blk 119, Sunset Way, 06-01, Singapore 2159 ('the property'). In the affidavit of one Lai Mun Kwan filed on 24 July 1985 in support of the application, it was stated that the second defendant was the registered co-owner of the property and that the same was mortgaged to the Development Bank of Singapore and DBS Finance Ltd. It is not disputed that the reference to 'registered co-owner' was not correct because the second defendant was actually the purchaser of the property under an agreement. Similarly the name of the mortgagee was wrongly stated. It should have been Singapore Finance Ltd.

After the making of the order nisi on 25 July 1985, but before it was made absolute, the third party, who was a creditor of the second defendant, intervened. In an affidavit filed on 8 August 1985 by one Lim Lai Wah on behalf of the third party, the latter informed the court that it had obtained a judgment against the second defendant on 5 August 1985 in Suit No 2089/1985 for $2 million, plus interest and costs. The third party pointed out that as the total amount which the second defendant owed the plaintiffs and the third party exceeded $5 million, the third party believed the second defendant was probably insolvent. The third party objected to the making of the order absolute. Alternatively, it asked for the charging order to be made absolute in favour of both the plaintiffs and the third party. An order absolute was accordingly made on 30 August 1985 in favour of both the plaintiffs and the third party. In the meantime, on 23 August 1985, the plaintiffs served a bankruptcy notice on the second defendant. As no payment was made pursuant to the notice, the second defendant committed an act of bankruptcy on 31 August 1985, a day after the making of the order absolute.

At the time of the making of the order absolute, a caveat had already been lodged at the Land Titles Registry by the mortgagee, Singapore Finance Ltd, the applicant/appellant in these proceedings (hereinafter called 'the appellant'). The caveat was lodged on 3 April 1981. On 10 October 1985 and 20 November 1985, the plaintiffs and the third party, respectively, lodged their caveats pursuant to the charging order. Due to an oversight, the appellant allowed its caveat to lapse. However, it filed a fresh caveat on 3 September 1986. On 29 December 1986, the appellant applied, by way of summons-in-chambers, to be added as a party and to set aside or vary the charging order obtained by the plaintiffs and the third party. The application to set aside or vary the charging order was refused by the assistant registrar.

This is an appeal by the appellant against the refusal of the assistant registrar to set aside or vary the charging order. Extensive arguments, both oral and written, have been submitted to me by the parties.

The main grounds advanced by the appellant before me to set aside or vary the charging order are these. First, that the interest of the appellant in the property was not brought to the attention of the court hearing the application for a charging order. Second, that there was no full and frank disclosure by the plaintiffs. Third, that the appellant was not heard by the court before the order nisi was made absolute. Fourth, that the court should not have made the order absolute, having regard to the fact that the third party had stated in its affidavit that it believed the second defendant was 'probably insolvent'. Fifth, as the second defendant had only an equity of redemption, that he could not and the court should not charge more than what he had. Sixth, that the plaintiffs and the third party failed to specify the precise interest of the second defendant which they intended to charge as required under O 50 r 1(4).

On the first ground, the appellant pointed out that in the said affidavit of Lai Mun Kwan filed herein on 24 July 1985, it was stated that the plaintiffs believed that the second defendant was a registered co-owner of the property and that the same was mortgaged to the Development Bank of Singapore Ltd and DBS Finance Ltd. As stated above, it is admitted that these allegations were not correct. Lai Mun Kwan did, however, state that this belief was based on a search which his solicitor caused to be carried out at the Registry of Land Titles and he did exhibit to that affidavit a copy of the subsidiary strata certificate of title ('the SSCT') which showed that there were two caveats lodged in respect of the property, one by the second defendant and the other by Singapore Finance Ltd, the appellant.

The application of the plaintiffs for a charging order was made pursuant to O 50 r 1 of the Rules of the Supreme Court 1970 ('the RSC'). Under r 1(4) it is provided that the application must be supported by an affidavit:

> (a) identifying the judgment or order to be enforced, and stating the name of the judgment-debtor on whose immovable property or interest it is sought to impose a charge and the amount remaining unpaid under the judgment or order at the time of the application;
> (b) specifying the immovable property on which, or an interest in which, it is sought to impose a charge; and
> (c) stating that to the best of the information or belief of the deponent the immovable property or interest in question is the judgment-debtor's and stating the sources of the deponent's information or the grounds for his belief.

Nothing in the foregoing requires that the particulars of any other party who may have an interest in the property should be disclosed. English cases decided after 1979 should be approached bearing in mind that changes were made in England on this matter by the Charging Orders Act 1979 and the consequential amendment to O 50 of the English RSC. The old forms of precedent included no reference to other creditors of the judgment-debtor or the personal circumstances of the judgment-debtor. In any event the present case was not a case of non-disclosure. The intention to disclose was clearly there when the plaintiffs exhibited the SSCT relating to the property. However, due to some inexplicable reasons, the mortgagee was wrongly described as Development Bank of Singapore Ltd and DBS Finance when it should have been Singapore Finance Ltd. But as the name of the mortgagee need not be specified, I am of the view that the misdescription of the mortgagee is immaterial.

As regards the second error – the misdescription of the interest of the second defendant – it may be useful to refer to the charging order absolute made on 30 August 1987 which is in these terms:

> The interest of the second defendant in the property at 06-01, Sunset Way, Block 119, Singapore 2159 (Lot 4129/U) 97 Mukim 5, Pandan) comprised in the Subsidiary Strata Certificate of Title Volume 176 Folio 94 stand charged in favour of the plaintiffs and the Bank of Montreal (third party) ...

The reference to 'the interest' of the second defendant in the property and the reference to the SSCT in the charging order absolute are particularly significant. In my view they go to show that the assistant registrar's attention was drawn to the SSCT, where the true position of the parties was set out. It therefore seems to me that the misdescription of the interest of the second defendant was also of no consequence. Except for these inconsequential errors, the affidavit filed in support of the application for a charging order had complied with O 50 r 1(4). In any event no prejudice had been caused thereby to any party. At the time when the charging order was made absolute, that order clearly ranked after the prior interest of the appellant, vide its caveat lodged on 3 April 1981.

I turn now to the second ground: no full and frank disclosure. To some extent, part of this ground overlaps with that of the first ground. The appellant contended that as there was a wrong reference to Development Bank of Singapore and DBS Finance as mortgagees and a wrong description of the second defendant's interest in the property, there was therefore no full and frank disclosure. For the reasons which I have alluded to under the first ground, I do not think there was any lack of full and frank disclosure. The SSCT was exhibited and all the material facts were there. In my view, the errors do not amount to 'an important misstatement' referred to by Kay J in *Republic of Peru* v *Dreyfus Brothers*[1] at p 803.

Also under this ground the appellant contended that the plaintiffs should have informed the court at the time of the hearing to make the order absolute that a bankruptcy notice had been served by the plaintiffs on the second defendant. In this regard I think the following points should be noted. First, there was no allegation that at the time when the order nisi was made on 25 July 1985 there was any non-disclosure as the bankruptcy notice had not yet been served. Second, the hearing to make the order absolute was not ex parte, but inter partes. The fact that the second defendant chose not to attend the hearing should not be held against the plaintiffs. Third, the court was informed by the third party that the second defendant was probably insolvent. The rule requiring full and frank disclosure of material facts applies in ex parte applications and an applicant who fails to do so will be deprived of the benefits of the order without going into the merits – see *R* v *Kensington Income Tax Commissioners, ex parte Princess Polignac*[2] – of course, this does not mean that just because a notice has been served on the other party who does not appear, the first party can with impugnity mislead the court. As Romilly MR stated in *Maclaren* v *Stainton*[3] at p 790, 'But if the respondent does not appear and the plaintiff, taking advantage of the absence, *entirely misleads* the court, then I think that the court ought properly to visit the party, so dealing, with the consequences, though not with the same strictness as in the case of an ex parte injunction.' As will be discussed below under the fourth ground, the fact that a bankruptcy notice had been served on the second defendant would not preclude the order nisi from being made absolute. There is no evidence that the plaintiffs had deliberately withheld information from the assistant registrar who made the order absolute. Neither has it been shown that the plaintiffs had misled the assistant registrar.

Reference was made by the appellant to the unreported case *The Committee of Receivers of Abdul Walab Galadari* v *Zealcastle Ltd*,[4] a decision of Harman J made on 28 July 1986. This case was decided under the new UK Charging Orders Act 1979 and it was an application to set aside an order absolute on the ground of non-disclosure of material facts in the affidavit in support of the application. The decision there rests on its own peculiar facts and I do not think it assists the appellant here.

Moving on to the third ground, there is nothing in O 50 r 1 which requires that the order nisi should be served on any other party who may have an interest in the same property, like the appellant here, or that such a party should be heard. The reason is obvious. In the ordinary course of things the prior interest of any other third person in the property would already have been protected by the lodgment of the appropriate caveat as was the case here. Any charging order made could not have affected that interest. It would serve no purpose at all in hearing a third person like the appellant, whose interest is that of a secured creditor.

The appellant has further argued that the reference in O 50 r 1(6) to the representation of 'the judgment debtor *or otherwise*' at the hearing for making an order absolute suggests that the appellant had a right to be heard. Rule 1(6) reads:

> On the further consideration of the matter the court shall, unless it appears (whether on the representation of the judgment-debtor or otherwise) that there is sufficient cause to the contrary, make the order absolute with or without modifications.

In my view, the reference to 'or otherwise' just means that the court will take into account all pertinent representations made, whether by the judgment-debtor or any other person. But it does not mean that any other person in the position of the appellant has a right to be heard, or to be served with the papers, failing which the whole proceedings would be wrong and the order made has to be set aside. The assistant registrar was informed that the property was mortgaged even though the name of the mortgagee was not correctly given. The court obviously did not think it necessary to hear the mortgagee, otherwise the court would have directed that the mortgagee be heard. Accordingly, in my judgment, the wrong name given in respect of the mortgagee could not and did not affect the decision of the court in making the charging order absolute.

I will now deal with the fourth ground which is the most substantial ground in this appeal. I should first recapitulate the following pertinent and undisputed facts. The charging order nisi was made on 25 July 1985 and it was made absolute on 30 August 1985. However, on 23 August 1985, a bankruptcy notice was served by the plaintiffs on the second defendant. As no payment was made by the second defendant, an act of bankruptcy was committed on 31 August 1985. The second defendant was made a bankrupt on 17 October 1986.

The appellant submitted that since the court was informed by the third party that the third party believed

the second defendant was 'probably insolvent', the court should not make the charging order absolute. The appellant argued that all creditors should be treated with equality. Counsel for the appellant cited extensively cases to show that the courts have ruled that once it is known that the judgment-debtor is insolvent or probably insolvent, a charging order should not be made absolute as that would make the particular creditor a secured creditor and thus gained priority over the general body of unsecured creditors. In further support of this line of argument, reference was also made to s 49 of the Bankruptcy Act.

I have considered the cases and they do not seem to go as far as the appellant alleged they have. Let me first refer to *George Lee & Sons* v *Olink*.[5] There Olink, who had died, owed the plaintiff a sum of money. His widow was granted probate of his will. The plaintiff applied for and was granted a garnishee order nisi against the firm of solicitors which was acting for the widow in the administration of Olink's estate. At the time when the plaintiff applied to have the order made absolute, there was a very serious doubt whether the estate was solvent. The district registrar not being convinced that the estate was insolvent, made the order absolute. On appeal, the Court of Appeal set aside the garnishee order absolute. Russell LJ said at p 362:

> On the facts the substance of the matter in this case is that here, on the evidence, there is a very serious doubt whether this estate is solvent and on full enquiry it may well be that it is insolvent. And the evidence at present is not, in my view, such as really enables us now to come to a definite conclusion.
>
> *Pritchard* v *Westminster Bank Ltd* [1969] 1 All ER 999 in this court, to which our attention was drawn, shows that where an estate which is the judgment-debtor's is insolvent, never mind precisely under what rules or how it has been administered, then a garnishee order nisi should not be made absolute, because an equitable remedy such as a garnishee order should not be given if the effect will be to prefer one creditor over another. But as I have said, it is not established whether this estate is insolvent or whether it is solvent.
>
> In my view the proper course in a case such as this is one which is analogous to that adopted in *Roberts* v *Death* (1881) 8 QBD 319 where the money due from the garnishee was ordered to be paid into court to abide the outcome of an enquiry...

The facts in *George Lee*[5] are clearly different from our present case. There it was an estate of a deceased person. I would have thought more analogous to that situation would be where a person is made a bankrupt or an order to wind up a company has been made. Subsequent cases like *Burston Finance* v *Godfrey*[6] and *Roberts Petroleum* v *Bernard Kenney*[7] appear to bear that out.

In *Wilson* v *Metropolitan Property*[8] the debtor-company was one in a group which was in serious financial difficulties. Its parent company had gone into creditors' voluntary liquidation on 7 June 1974. At a meeting of creditors of the group on 19 July 1974, it was decided that a six-month moratorium be observed on the enforcement of debts of the companies in the group. On 22 October 1974, the debtor-company presented its own petition for winding up. In the meantime the creditor-company was granted a garnishee order nisi on 12 September 1974. At a hearing on 1 November 1974, the registrar made the order absolute. The debtor-company appealed and Buckley LJ said at p 819:

> I think we have got to bear in mind that where insolvent estates are to be administered it is the policy of the law that creditors should, so far as possible, be treated with equality, and the fact that in the present case the debt which the judgment-creditor seeks to attach would not have come into existence had the judgment-creditor not performed a contractual obligation which he was bound to the judgment-debtor to perform, does not seem to me to be a reason for disregarding that general policy.
>
> The position is, I think, that a court in considering whether or not to exercise its discretion to make absolute a garnishee order in circumstances such as this, must bear in mind not only the position of the judgment-creditor, the judgment-debtor and the garnishee, but the position of the other creditors of the judgment-debtor and must have regard to the fact that proceedings are on foot, and were on foot at the time the garnishee proceedings were launched, for ensuring the distribution of the available assets of the judgment-debtor company among the creditors pari passu.

Wilson[8] in fact followed the earlier case of *Hudson's Concrete Products Ltd* v *DB Evans (Bilston) Ltd*[9] where the judgment-creditors obtained a judgment on 14 December 1960. However, prior to this in November 1960, the judgment-debtors who were in financial difficulties, sent a circular to all its creditors containing certain proposals. The judgment-creditors obtained a garnishee order nisi on 20 December 1960, attaching all debts owing by the garnishee, who was a bank, to the judgment-debtors. On 16 January 1961, the judgment-debtors took out a summons under s 206 of the Companies Act 1948 for the sanctioning of a scheme of arrangement. On that same day a creditor filed a petition for the winding up of the judgment-debtor company. On the following day, 17 January 1960, the garnishee order was made absolute. The Court of Appeal discharged the order absolute.

Coming up close on the heel of *Wilson*[8] was the case *Rainbow* v *Moorgate Properties Ltd*[10] which involved a debtor-company in the same group as the debtor-company in *Wilson*.[8] In *Rainbow*,[10] the debtor-company presented its own petition for a winding-up order. The following day, the judgment-creditors applied to have the charging order nisi, which they had obtained earlier against the leasehold interest of the debtor company in a building, made absolute. The application was opposed by the debtor-company on the ground that its effect would be to prefer the judgment-creditors to other unsecured creditors of an insolvent company. The registrar

nevertheless made the order absolute. On appeal, Buckley LJ said at p 825:

> The effect of the charging orders in this case has to be considered in the light of the fact that on 3 December 1974 – the day before the orders were made absolute – the defendant company presented its own petition for winding up.

and at p 826:

> So also in the present case, it seems to me, it would be wrong, *in the circumstances at present exist*, that the plaintiffs should have the benefit of these charging orders. While I have much sympathy for the plaintiffs and quite understand that they are anxious that payment should be made, I think it is wrong, when the court is aware of the fact that the debtor is, or is likely to turn out to be, insolvent, that one creditor should be given an advantage over other creditors by an exercise of the discretion of the court under s 35 of the Administration of Justice Act 1956. It is not that the moratorium is binding on the plaintiffs and that they are doing, or have done, anything wrong in seeking to obtain the charging orders; the moratorium clearly is not binding on them because they were no party to the resolution setting it up. But the court has to be satisfied that it is proper for the court, in the exercise of its discretion, to place them at an advantage over other creditors. If there were no countervailing reasons the court would make charging orders in the present case but, in my judgment, there are countervailing reasons connected with the moratorium and the proposed scheme of arrangement which I have mentioned which in this case do make it improper to give the plaintiffs an advantage over other creditors.
> (emphasis added)

While the cases of *Hudson's Concrete Products Ltd*[9] and *Wilson*[8] relate to the grant of garnishee orders, it would seem that there is no difference in the considerations that apply to the grant of a garnishee order or a charging order: see *White Book* (1979) para 50/1/2A. As Buckley LJ had observed in *Rainbow*[10] (at p 825):

> I myself think that there is a close analogy between garnishee proceedings and charging order proceedings ... and I for myself can see no difference between those considerations which are relevant to the question whether the discretion should or should not be exercised to make absolute a garnishee order and those considerations which are relevant to the question whether the court should or should not make absolute a charging order.

In the later case of *Burston Finance* v *Godfrey*,[6] the plaintiff company obtained a judgment against the bankrupts. On 5 February 1975, it applied and obtained a charging order nisi against the land owned by the bankrupts. On 19 February 1975, the bankrupts presented their own petitions in bankruptcy and receiving and adjudicating orders were accordingly made on the same day. On 20 February 1975, the plaintiff company applied to the Master to make the charging order absolute and the application was granted. On appeal by the trustee in bankruptcy, the Court of Appeal dismissed the appeal on the ground that as there was no evidence of any understanding among the creditors nor any evidence that the plaintiff company had exercised undue haste to obtain a preferred position for itself as compared with the general body of creditors, the trustee in bankruptcy had failed to show that it would be inequitable in the circumstances that the order should be made absolute. It is of significance to note that in this case the charging order was made absolute one day after the debtors had presented their own petition in bankruptcy and were made bankrupts. Megaw LJ said at p 988:

> So sufficient cause is not shown and the charging order should stand. I reach that conclusion mainly because there was here, so far as the evidence goes, no understanding nor any indication of any attempt to reach an understanding among the creditors of the bankrupts, or among any of them, as to common forbearance from pressing individual remedies, in the interests of all.

However, this additional requirement (ie no understanding or attempts to reach understanding among creditors) laid down in *Burston Finance*[6] was disapproved of by the House of Lords in the later case of *Roberts Petroleum* v *Bernard Kenney*.[7] In *Roberts Petroleum*,[7] the debtor-company went into creditors' voluntary liquidation after a charging order nisi was made but before the order was made absolute. The House of Lords held that if a charging order nisi over land was made and if before the court considered whether to make the order absolute a statutory scheme for dealing with its assets was irrevocably imposed on the company by resolution or by a winding-up order the court should in those circumstances exercise its discretion by refusing to make the order absolute. Lord Brightman at pp 571-572 stated:

> ... that cases like the present involve a conflict between two well-established principles of law, which were, first, that –
>
> 'a judgment-creditor is in general entitled to enforce a money judgment which he has lawfully obtained against a judgment-debtor by all or any of the means of execution prescribed by the relevant rules of court'
>
> and, second, that –
>
> 'when a judgment-debtor, whether he be a natural person or a corporate body, has become insolvent, all the unsecured creditors should be treated equally, each receiving the same proportionate share of the inadequate fund available as all the others.'
>
> The basic question, therefore, which confronts the court when it is faced with an application by an execution-creditor to convert an order nisi into an order absolute in a case such as the present is whether the asset in question should fall outside the statutory scheme which, by virtue of the liquidation, is then in existence or should be subject to that scheme. In the absence of persuasive authority to the contrary, and it will of course be necessary to consider the authorities, I would myself have thought that the court should exercise its discretion so that the asset falls within the statutory scheme. The purpose of the further consideration of the order nisi is to enable the court to review the position inter partes. At the date of the order nisi the court has made no irrevocable

decision. If, therefore, the statutory scheme for dealing with the assets of the company has been *irrevocably imposed* on the company, *by resolution or winding-up order, before* the court has irrevocably determined to give the creditor the benefit of a charging order, I would have though that the statutory scheme should prevail. Unquestionably that would be the position if the winding-up order or resolution had preceded the order nisi: see s 228 of the Companies Act 1948 (compulsory liquidation) and *Westbury* v *Twigg & Co Ltd* [1982] 1 QB 77 (voluntary liquidation). To my mind the position should be the same if liquidation commences after the order nisi but before the court has committed itself to a final order. I do not see why a creditor should gain an advantage merely because he has a revocable order for security at that time when the statutory scheme comes into existence. (emphasis added)

My attention was also drawn by the appellant to an unreported English case, *Weldtite Engineering Ltd* v *Beverley Engineering Ltd*,[11] decided by Hirst J on 28 April 1986. There the plaintiff obtained a judgment against the defendant company on 2 April 1985 and a charging order against the property of the defendant company's property was obtained on 4 April 1985. The charging order was made absolute by the Master on 9 May 1985. An appeal against the decision of the Master was lodged on 16 May 1985. The defendant company went into creditors' voluntary winding up on 1 July 1985. The difference between this case and *Roberts Petroleum*[7] would appear to be that in this case the winding up did not take place until after the charging order was made absolute. The judge held that as an appeal from the Master to a judge in chambers was a re-hearing of the entire case, the court should look at the case afresh and view it in the light of the situation which existed at the hearing before the judge rather than placing himself in the shoes of the Master. Hirst J said:

I have a completely fresh discretion and I am entitled and indeed bound to look at all the facts as they exist today, and it follows that the defendants' insolvent liquidation is fatal to the making of a charging order absolute.

Turning to the instant case, the situation here is quite different from the situations in all those cases reviewed above. As I have earlier observed, this is not a case involving the estate of a deceased person, as in *George Lee*.[5] In *Wilson*[8] and *Rainbow*,[10] there was a moratorium agreed to by all the creditors of the group and before the order nisi was made absolute, the debtor-company presented its own petition for winding up. In *Hudson's Concrete Products*,[9] before the order nisi was made absolute a summons was taken out to sanction a scheme of arrangement and one of the creditors had filed a petition in court to wind up the debtor-company. In *Burston Finance*,[6] before the charging order nisi was made absolute, the debtors were already adjudicated bankrupts. Lastly, in *Roberts Petroleum*,[7] the debtor company went into creditors' voluntary liquidation before the charging order was made absolute. Further, in all these cases it was the judgment-debtor or trustee in bankruptcy who appealed against the making of the charging order.

Broadly I agree with the following conclusion drawn by Mr Pereira in his written submission:

The law is therefore clear that where a judgment-debtor's company is insolvent *and* if between the making of the order nisi and the order absolute the statutory scheme for the distribution of a company's assets comes into operation by the presentation of a petition or the passing of a resolution for voluntary winding up, the court will not make the order absolute. It is not necessary that a winding-up order be made between the order nisi and the order absolute. The mere commencement of the liquidation is sufficient. (emphasis is mine)

While the case of *Weldtite Engineering*[11] decided that the judge hearing an appeal from the decision of the Master in making a charging order absolute could take into account the fact that after the making of the order absolute and before the hearing of the appeal the company went into creditors' voluntary winding up, this is not the position in our present case. Here the appellant is seeking to set aside a charging order long after it was made and long after the period to file an appeal had expired. Assuming that *Weldtite Engineering*[11] was rightly decided, it does not assist the appellant.

The appellant here relies on a statement in the affidavit filed on behalf of the third party where the third party stated that the second defendant was 'probably insolvent'. However, the fact remains that on the date the charging order was made absolute on 30 August 1985, no act of bankruptcy had yet been committed by the second defendant. No bankruptcy petition had been filed against the second defendant. The above cases quite clearly show that for it to be improper to make an order absolute there must have been a petition filed to wind up the company or a resolution of the company to wind itself up. In the case of an individual, at least an act of bankruptcy must have been committed before the court should refuse to make an order absolute. I do not think the mere issue and service of a bankruptcy notice has the same effect as the filing of a winding-up petition against a company. Indeed, the appellant conceded that the mere issue and service of a bankruptcy notice does not bring into operation the statutory scheme contained in the Bankruptcy Act. There must be an act of bankruptcy. The title of the Official Assignee relates back to the date of the commission of the act of bankruptcy. To date no other creditors have questioned the charging order made. Order 50 r 1(6) of the Rules of the Supreme Court provides that unless 'there is sufficient cause to the contrary', the court may make the order absolute with or without modifications. In my view, as on 30 August 1985, there was no sufficient cause to the contrary for the court not to make the order absolute.

The appellant has also contended that the charging order should not be made absolute because of s 49 of the Bankruptcy Act (Cap 20, 1985 Ed). That section relates to the condition under which a creditor who has issued execution against the debtor may or may not retain the benefit of the execution as against the Official Assignee. In my opinion it has no bearing on the question whether the charging order in the present case should be made or whether it should be set aside. All that the section means, in the circumstances of the present case, is that as the plaintiffs have not completed the execution before notice of the commission of an act of bankruptcy by the second defendants, the plaintiffs may not retain the benefit of the execution: see *Re a Debtor.*[12] The fact of non-completion of execution of the charging order cannot per se render the making of that order bad. The net result of the section is that the benefit of the charging order will have to be distributed among all the unsecured creditors of the second defendant.

Reference was made by the appellant to the following remarks of Shaw LJ in *Burston Finance*[6] where the Lord Justice in dealing with the English equivalent of our s 49 of the Bankruptcy Act said:

> Where the circumstances are such that the subject matter of the charging order nisi would be valueless to the judgment-creditor so that it would be pointless to make the order absolute, refusal would be justified. In such a case, the creditor is deprived of nothing which will advantage him in seeking satisfaction of his judgment.

At the time when the charging order absolute was made in our present case, it could not be said for certain that the order would be valueless to the plaintiffs and the third party. And even on the facts now before me, it cannot be said that the order is valueless to the plaintiffs and the third party. If it were so valueless, the plaintiffs and the third party would not have resisted this application to set aside the order so vigorously. In any case, I doubt this is a relevant consideration in an application to set aside a charging order.

I will now move on to the fifth ground. One of the express terms of the mortgage in escrow (and the related deed of assignment) entered into between the second defendant and the appellant was that the second defendant as mortgagor 'shall not without the prior consent in writing of the mortgagee create or make any further or subsequent mortgage or otherwise howsoever charge or encumber the mortgaged property'. The appellant argued that as it had never given its consent for the property to be charged, the charging order should not have been made and the court was wrong in so making the order. I see no merit in this argument. The second defendant never created this charge. It is a charge created by the process of law on the initiative of a judgment-creditor. There was no breach of that condition on the part of the second defendant.

A related argument advanced by the appellant is that in view of the mortgage in favour of the appellant, all that remained of the second defendant's interest in the property would be the equity of redemption and the assistant registrar was wrong in not varying the charging order to limit it to the equity of redemption. A number of authorities have been cited to me to show that a charging order can only affect that part of the property which belongs to the debtor and nothing more: see *Hawks* v *McArthur Dalston Development Pty Ltd* v *Dean*[13] and *Holt* v *Heatherfield Trust Ltd.*[14] In *Whitworth* v *Gaugain,*[15] Wigram VC said:

> A creditor might under his judgment take in execution all that belongs to his debtor and nothing more. He stands in the place of the debtor. He only takes the property of his debtor. He only takes the property of his debtor subject to every liability under which the debtor himself hold it.

I agree that these cases set out the general law. But there is a qualification. This qualification was recognized by the Privy Council in *Chung Khiaw Bank Ltd* v *United Overseas Bank Ltd*[16] where Lord Wilberforce stated at p 186:

> These cases lend substantial support to the contention that under the general law, apart from the special provisions of legislation as to registration and in certain circumstances even where such special provisions exist, the judgment-creditor can only take whatever interest the debtor has and that, in such a case, questions of priority and correspondingly of postponement through failure to register, do not arise.

Granted that the facts in *Chung Khiaw Bank*[16] are different from the present case. First, the legislation involved is different – there it was the Registration of Deeds Act and here we are concerned with the Land Titles Act. Second, in *Chung Khiaw Bank*[16] the mortgage was never registered. Here a caveat was lodged by the appellant on 3 April 1981, but it was inadvertently allowed to lapse. It is quite clear that the Land Titles Act provides for a system of land registration, including the lodgment of caveats to protect unregistered interests in land. A great deal of arguments have been advanced to me on the question whether in such circumstances, the interests of the plaintiffs and the third party under the charging order have acquired priority over the mortgagee's interest of the appellant. This is a question of law. But I do not think this is the proper forum to deal with the question of priority. The question for my decision now is whether the assistant registrar erred in refusing to set aside or vary the charging order absolute made on 30 August 1985.

Now I turn to the sixth ground. The appellant contended that a judgment-debtor applying for a charging order must specify the precise interest intended to be charged, ie equity of redemption. Order 50 r 1(4) requires that such an application must be supported by an affidavit identifying, inter alia, 'the immovable property on

which, or an interest in which, it is sought to impose a charge'. The application of the plaintiffs did identify the immovable property on which it was sought to impose a charge. The affidavit in support also stated that the property had been mortgaged. The SSCT was exhibited to the affidavit. In my view that satisfied r 1(4). The charging order absolute refers to 'the interest of the second defendant in the property ... comprised in the Subsidiary Strata Certificate of Title Volume 176 Folio 94 ...'. I do not think it is necessary or advisable that the charging order should refer only to the equity of redemption as contended by the appellant. The Land Titles Act provides for a system of lodgment of caveats for the protection of unregistered interests in registered lands. There may very well be disadvantages in specifically referring to the equity of redemption in the charging order. What will be the effect of such a charging order when the mortgage is redeemed? In any event this is not a requirement of r 1(4). In my view the case *Re Overseas Aviation Engineering (GB) Ltd*[17] is of no assistance to the appellant as it was concerned with a different point.

There is one incidental point raised by the appellant. The point is that the assistant registrar should not have included the judgment debt due to the third party in making the charging order absolute. The appellant contended that the third party should make a separate application for a charging order in respect of the debt due to the third party. It is not denied by the appellant that the debt due from the second defendant to the third party was under a judgment. No authority has been cited to me in support of the appellant's contention. The making of a charging order is an equitable remedy. Order 50 r 1(6) expressly permits the court to make the order absolute with or without modifications. To insist that the third party should file a separate application for a charging order would only mean that more costs would be incurred besides there being delay. Accordingly, I do not find any merit in this point.

Before I conclude, I should address a jurisdictional issue raised by the third party. I feel I ought to express my views briefly even though it will not affect the outcome of this appeal in view of the decision I have already taken on the grounds raised in this appeal. The point made is that the court has no jurisdiction to set aside or vary a charging order. Order 50 r 7 prescribes the procedure for discharging a charging order on *securities*. But there is nothing express in the Rules of the Supreme Court empowering the court to do so in relation to a charging order on immovable property.

The third party drew my attention to para 556 of 26 *Halsbury's Laws of England*, 4th Ed, where it is stated:

> As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been entered, either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. The object of the rule is to bring litigation to finality.

But the paragraph goes on to state that the general rule is subject to a number of exceptions – one of which is that 'where there has been some procedural irregularity in the proceedings leading up to the judgment or order which is so serious that the judgment or order ought to be treated as a nullity, the court will set it aside'.

The assistant registrar, before whom the same point was argued, relied upon the cases dealing with the setting aside of garnishee orders, ie *O'Brien* v *Killeen*,[18] *Marshall* v *James*[19] and *Moore* v *Peachey*,[20] to hold that the court has inherent jurisdiction to set aside a charging order absolute. Counsel for the third party argued that in these cases there was a fundamental error (ie no debt or a mistake as to identity) which was not so in our present case. Thus, he said that the assistant registrar had wrongly applied the principles enunciated in those cases. I do not accept this submission. Like O 50 r 1 on charging orders on immovable property, there is also no express provision in O 49 for the setting aside of garnishee orders. The third party does not dispute that the court has inherent jurisdiction to set aside a garnishee order for fundamental errors. But surely there is a distinction between a point of jurisdiction and a point relating to the merits of an application. It seems to me that the argument of the third party relates to merits rather than to jurisdiction. I do not think the instances in which a garnishee order may be set aside should be confined to the situations that arose in those cases. Similarly, I do not see any reason why the instances in which a charging order may be set aside should also be so restricted. It must surely depend on the seriousness of the relevant non-compliance or irregularity.

Before I leave this point, I wish to mention that the position now in England is clearly set out. Section 3(5) of the Charging Orders Act 1979 and O 50 r 7 of the English RSC expressly empower the court to discharge a charging order on land. These amendments have not yet been introduced in Singapore. Therefore, the position in England before 1979 still prevails here.

In conclusion, let me say that the present application and appeal would not have arisen had it not been for the fact that the appellant had overlooked to renew its caveat which lapsed on 3 April 1986. In the meantime and pursuant to the charging order granted, the plaintiffs and the third party filed their respective caveats. To remedy the situation somewhat the appellant filed a fresh caveat. In order of time this fresh caveat lodged by the appellant came after the caveats lodged by the plaintiffs and the third party. As I have said above, it is not for me in this proceeding to determine whether the appellant has lost its priority. That question will have to be addressed

separately. But what the appellant now seeks to achieve by this application is to ask this court to cure its lapse and preserve its previous position. Let me also add that if this court were to set aside the charging order, the appellant would be better off than all other unsecured creditors. The cases so strenuously relied upon by the appellant refer to the need of ensuring pari passu distribution among unsecured creditors. But here the appellant is claiming as a secured creditor. I do not think it lies in the mouth of the appellant to quote principles which application here would defeat the very interest of those for whom the principles were intended to protect.

The appellant has failed to show that there had been any serious irregularity in the plaintiffs' application to obtain the charging order. That should suffice to dismiss this appeal. Further, having examined the merits relating to the making of the charging order as discussed above, I find that the appellant has not shown that the plaintiffs and the third party had acted with undue haste or had taken any unfair advantage. The appellant has failed to show that it was inequitable to make the order absolute.

For the foregoing reasons, I would dismiss the appeal with costs.

Order accordingly.

Solicitors: *Foo & Quek*; *Chu Chan Gan & Ooi*; *Arthur Loke & Partners.*

Reported by *Wong Kim Fatt*

VD Sujatha v G Prabhakaran Nair

HIGH COURT (SINGAPORE) – DIVORCE NO 69 OF 1986
CHAN SEK KEONG J
21 JULY 1988

Civil Procedure – Costs – Order for costs – Construction of order – Order for costs of proceedings made at time of grant of decree nisi – Ambiguity in order – Question of maintenance adjourned – Costs of maintenance proceedings – Discretion of court

Family Law – Maintenance proceedings – Costs – Order for costs – Construction of order – Order for costs of proceedings made at time of grant of decree nisi – Ambiguity in order

When granting the decree nisi on a petition for divorce, the judge had ordered, inter alia, that 'the respondent do pay the petitioner the costs of these proceedings' and that the question of maintenance for the petitioner be adjourned. Subsequently, in maintenance proceedings before another judge, the petitioner obtained an order for maintenance for which no order for costs was made as it was not asked for. The petitioner then applied for review of the maintenance order on the ground that further facts had come to light which justified a higher award but later withdrew her application. A question arose regarding the costs of the maintenance proceedings.

The senior assistant registrar when taxing the petitioner's bill of costs held that the order for costs made by the previous judge meant that the entire costs of the petition, in which the question of maintenance was one prayer, were to be borne by the respondent. The respondent applied for review of the relevant items of the bill of costs.

Held, allowing the application: (1) It is an established principle that costs are in the discretion of the court and that it is not competent for the court to fetter its discretion as to costs of future applications in the cause the circumstances of which cannot possibly be known to it at the date of the decree nisi. Any costs to be incurred subsequently in any ancillary matter should be awarded separately upon the merits of that application.

(2) Where an order of the court is capable of being construed to have effect in accordance with or contrary to established principles of law or practice, the proper approach, in the absence of manifest intention, is not to attribute to the judge an intention or a desire to act contrary to such principles or practice but rather in conformity with them. If in the present case the order on its true interpretation by its own force imposed a liability for all future costs on the respondent, it would be an improper order. Therefore as the order was ambiguous, the expression 'in these proceedings' in the said order should be construed to refer only to the proceedings in connection with the primary relief for dissolution of the marriage. The said order should not be construed to and it does not render the respondent liable for all costs in respect of proceedings subsequent to the hearing of the petition on the dissolution of the marriage. Such costs must be asked for and given separately in each subsequent proceeding.

Case referred to
1 *Fenston* v *Fenston* [1945] 2 All ER 700 (folld)

LJ Low (Miss) for the petitioner.
B Ganeshamoorthy for the respondent.

Cur Adv Vult

Chan Sek Keong J: This is an application by the respondent for review of 18 items allowed by the senior assistant registrar in the taxation of costs by the petitioner against the respondent. These items pertained to maintenance proceedings subsequent to the divorce proceedings in which Wahab Ghows J, when granting the decree nisi, made an order for costs in the following terms:

> ... and it is ordered that:
> (1) the question of maintenance or lump sum or sums for the petitioner be adjourned to chambers for a date to be fixed by the registrar;
> (2) the respondent do pay the petitioner the costs of these proceedings.

At the hearing on 25 November 1986 for maintenance before me in chambers, I made an order that the respondent pay to the petitioner a lump sum of $5,500 in lieu of periodic maintenance on the ground that the petitioner had decided to return permanently to India. At this